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Constitutional Law: The Equal Protection Clause: The Effect of *Plyler v. Doe* on Intermediate Scrutiny

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NOTES

Constitutional Law: The Equal Protection Clause: The Effect of *Plyler v. Doe* on Intermediate Scrutiny

When deciding claims arising under the equal protection clause of the fourteenth amendment,[1] courts have consistently applied one of two standards of judicial review. In cases involving a state classification denying a fundamental right or affecting a "suspect class,"[2] courts apply strict judicial scrutiny and require the state to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest. In cases involving classifications of social or economic welfare, the courts generally require the state to show only that the classification rationally relates to a legitimate governmental function.[3]

This note will attempt to analyze the recent United States Supreme Court holding in *Plyler v. Doe*[4] in which the Court appears to deviate from the two-tier model designed and previously applied to claims arising under the equal protection clause. The cases before the Court involved claims by undocumented alien children that the Texas Education Code[5] violated the equal

1. U.S. CONST. amend. XIV.

2. Persons discriminated against based on ethnic background rather than individual actions, or the classifying of persons on the basis of status, racial minority, or national origin. *See* Graham v. Richardson, 403 U.S. 365, 372 (1971); Brown v. Board of Educ., 347 U.S. 483, 490 (1954); Truax v. Raich, 239 U.S. 33, 41-43 (1915).

3. The Supreme Court has used an "intermediate tier" in very limited circumstances where the case has involved a statutory classification based on gender or illegitimacy. *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977) (Illinois Probate Act allowing illegitimate children to inherit by intestate succession only from their mother, while allowing legitimate children to inherit from both their mother and father by intestate succession was held to invidiously discriminate against illegitimate children in violation of the equal protection clause); Craig v. Boren, 429 U.S. 190 (1976) (Oklahoma statute prohibiting sale of 3.2% beer to males under 21 years of age and females under 18 years of age held unconstitutional because the gender-based differential invidiously discriminated against males 18-20 years of age in violation of the equal protection clause); Weber v. Aetna Cas. & Surety Co., 406 U.S. 164 (1972) (Louisiana's workmen's compensation law providing unacknowledged illegitimate children of a deceased worker are not within the class of "children" but are relegated to the lesser status of "other dependents" and may recover only if there are not enough surviving dependents in the preceding classes to exhaust the maximum benefits was held to violate the equal protection clause); Reed v. Reed, 404 U.S. 71 (1971) (provision of Idaho Probate Code giving preference to men over women when persons of the same entitlement class apply for administering a decedent's estate held unconstitutional under the equal protection clause).

4. 102 S. Ct. 2382 (1982) *aff'g* 628 F.2d 448 (5th Cir. 1980), decided with Texas v. Certain Named & Unnamed Undocumented Alien Children, on appeal from the same court.

5. TEX. EDUC. CODE ANN. § 21.031 (Vernon 1972) provides in pertinent part:

protection clause of the fourteenth amendment. The statute allows the state to withhold from local school districts any state funds for the education of children not legally admitted into the United States and authorizes the local school districts to deny enrollment in their public schools to such children. The plaintiffs in *Plyler* were certain school-age children excluded from the public schools because they could not establish that they had been legally admitted into the United States.

The question raised by these cases is whether Texas may deny undocumented alien school-age children the free public education the state provides to children who are citizens of the United States or legally admitted aliens without violating the equal protection clause. In *Plyler* the United States Supreme Court held that section 21.031 of the Texas Education Code[6] violated the equal protection clause by withholding from local school districts any funds for the education of children who were not "legally" admitted into the United States and authorizing local school districts to deny enrollment to such children.

The Background Decisions on Equal Protection Claims

Prior to the decision in these cases, claims that state statutes violate the equal protection clause of the fourteenth amendment have generally been decided on the basis of whether a fundamental right or a suspect class was involved. In cases involving either a fundamental right or a suspect class,[7]

(a) All children who are citizens of the United States or legally admitted aliens and who are over the age of five years and under the age of 21 years on the first day of September of any scholastic year shall be entitled to the benefits of the Available School Fund for that year.

(b) Every child in this state who is a citizen of the United States or a legally admitted alien and who is over the age of five years and not over the age of 21 years on the first day of September of the year in which admission is sought shall be permitted to attend the public free schools of the district in which he resides or in which his parent, guardian, or the person having lawful control of him resides at the time he applies for admission.

(c) The board of trustees of any public free school district of this state shall admit into the public free schools of the district free of tuition all persons who are either citizens of the United States or legally admitted aliens and who are over five and not over 21 years of age at the beginning of the scholastic year if such person or his parent, guardian, or person having lawful control resides within the school district.

6. *Id.*

7. Cases in which the Court has found a "suspect class" include Nyquist v. Mauclet, 432 U.S. 1, 7-9 (1977) (classification based on alienage is suspect and subject to strict judicial scrutiny); Sugarman v. Dougall, 413 U.S. 634, 641-42 (1973) (where classification based on alienage is involved the Court will look to the substantiality of the state's interest in enforcing the statute and the narrowness of the limits within which the discrimination is confined); Graham v. Richardson, 403 U.S. 365, 372 (1971) (classification based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny); Brown v. Board of Educ., 347 U.S. 483, 490 (1954) (the fourteenth amendment proscribes all state-imposed discriminations against the Negro race).

Fundamental rights are those rights found either explicitly or implicitly in the United States Constitution. Cases in which the Court has found rights implicitly protected by the Constitution:

the United States Supreme Court has held the state to a rigorous judicial scrutiny. "Classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."[8]

The Supreme Court has previously held that aliens are a suspect class and a statute involving a classification based on alienage will be subject to strict judicial scrutiny, regardless of whether a fundamental right is involved.[9] Such a statute will be upheld only if it does not conflict with federal legislation relating to aliens and the statute is necessary to protect the achievement of a compelling governmental interest.[10] Under this strict judicial scrutiny it appears a state will rarely be able to show a need to deny the fundamental right or to distinguish between the suspect class and other citizens in order to promote a compelling state interest.[11]

Roe v. Wade, 410 U.S. 113, 147-64 (1973) (the Court recognizes the right of privacy will protect a woman's right to choose to have an abortion during the first trimester of her pregnancy); Dunn v. Blumstein, 405 U.S. 330, 336-42 (1972) (the Court recognizes the right to participate in state elections on an equal basis with other citizens in the jurisdiction as fundamental). The Court also recognizes the right to travel as a fundamental right: Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966); Griswold v. Connecticut, 381 U.S. 479 (1965) (the Court recognizes the right of privacy as embodied within the Constitution that will protect an individual's right to obtain contraceptives); Reynolds v. Sims, 377 U.S. 533, 563 (1964) (in regard to suffrage the Court has recognized the need for strict scrutiny as arising from the significance of the franchise as the guardian of all other rights).

8. Graham v. Richardson, 403 U.S. 365, 372 (1971). In *In re* Griffiths, 413 U.S. 717 (1973), the Court required the state to demonstrate that the classification imposed by the statute was precisely tailored to serve a compelling state interest. "In order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest." *Id.* at 721-22.

9. Nyquist v. Mauclet, 432 U.S. 1, 7-9 (1977); Sugarman v. Dougall, 413 U.S. 634, 641-42 (1973); Graham v. Richardson, 403 U.S. 365, 376 (1971).

10. Nyquist v. Mauclet, 432 U.S. 1, 10 (1977) (the Court held that incentives to seek naturalization was not sufficient justification for denying assistance for higher education to aliens not willing to seek U.S. citizenship). Incentive to naturalization is not within the state's control, but is entrusted solely to the federal government; De Canas v. Bica, 424 U.S. 351 (1976) (the Court held constitutional a statute prohibiting an employer from knowingly hiring an alien not entitled to lawful residency in the United States if such employment would have an adverse effect on lawful resident workers. The Court determined the statute was within the state's authority to regulate employment and the statute did not conflict with pertinent federal laws, i.e., the Immigration and Nationality Act); *In re* Griffiths, 413 U.S. 717 (1973) (the Supreme Court held a statute denying resident aliens admission to the bar violated the equal protection clause because the classification in the statute was not shown necessary to safeguard any substantial state interest); Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948) (the Supreme Court held a statute denying issuance of commercial fishing licenses to aliens ineligible for citizenship to be in violation of the equal protection clause. The Court found such a classification unreasonable. Although the federal government can regulate immigration and naturalization based in part on race and color classifications, it does not follow that a state may use similar classifications to prevent lawfully admitted aliens within its borders from earning a living in the same way other state inhabitants earn their living).

11. Justice Thurgood Marshall specifically pointed out in Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 320 (1976) (Marshall, J., dissenting) that legislation is nearly always struck down when subjected to strict judicial scrutiny.

Perhaps this is the reason the Supreme Court has begun a systematic retreat from the view that all state legislation permitting discrimination based on alienage be required to clear the high hurdle of strict judicial review. Under certain circumstances the Court has refused to invoke strict judicial scrutiny even though the legislation involved a classification based on alienage.[12] Where the classification excludes aliens from certain types of employment determined by the Court to be within the category of important nonelected officials, the legislation has been upheld. The state is permitted to assume generally that persons who are citizens or who have not declined the opportunity to seek United States citizenship are better qualified for such positions than those persons who choose to remain aliens.[13]

Application of the Equal Protection Clause to the Plaintiffs in Plyler

The decision of the Supreme Court in *Plyler* insofar as the determination that the equal protection clause applies to the illegal alien children who are plaintiffs in this action because they were within the state's territorial jurisdiction[14] does not appear to be controverted by the dissent.[15]

Early in the nation's history the Court held:

> [The] Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: "Nor shall any State deprive any person of life, liberty or property without due process of law;

12. Ambach v. Norwick, 441 U.S. 68 (1979) (the Court upheld a statute forbidding certification as a public school teacher to anyone not a citizen of the United States unless that person had manifested an intention to apply for citizenship); Foley v. Connelie, 435 U.S. 291 (1978) (the Court upheld a statute prohibiting appointment to the state police force of any person not a citizen of the United States); Mathews v. Diaz, 426 U.S. 67 (1976) (the Court upheld the provision of the Social Security Act, which denied eligibility for Medicare to aliens, 65 or older, unless they had been admitted for permanent residence and had resided in the United States for five years); Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1973) (the Court held an employer could discriminate in its hiring practices based on alienage by requiring employees to be United States citizens. The Court determined the term "national origin" in section 703 of the Civil Rights Act of 1964 did not embrace the requirement of citizenship. Discrimination based on citizenship is unlawful whenever it has the purpose or effect of discriminating on the basis of national origin).

13. Ambach v. Norwick, 441 U.S. 68, 80-81 (1979) (the Court applied rational relationship judicial scrutiny to uphold a statute denying aliens who were not U.S. citizens and who refused to seek U.S. citizenship the right to be certified as public school teachers. The Court determined public school teachers perform one of those governmental functions that is so bound up with the operation of the state as a governmental entity that the exclusion from those functions of all persons who have not become part of the process of self-government is permissible); Foley v. Connelie, 435 U.S. 291, 300 (1978) (Using rational relationship judicial scrutiny, the Court upheld a statute prohibiting the appointment of any person not a U.S. citizen to the state police force. The Court found in the enforcement and execution of the laws the police function is one where citizenship is rationally related to the specific demands of the particular position. For that reason the state may confine the performance of this important public responsibility to citizens of the United States).

14. Plyler v. Doe, 102 S. Ct. 2382, 2394 (1982).

15. *Id.* at 2409 (Burger, C.J., dissenting).

> nor deny *any person within its jurisdiction* the equal protection of the law." These provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any difference of race, color, or nationality; and the equal protection of the laws is a pledge of the protection of equal laws.[16]

This right of *any person* within a state's territorial jurisdiction to claim protection of the equal protection clause has continued to be recognized by the Court.[17] Not long after the Court first held that the equal protection clause extended its protection of equal laws to any person within a state's jurisdiction, the Court held that the clause also extended its protection to aliens within a state's territorial jurisdiction without regard to race, color, or national origin.[18] More recent cases have recognized that even aliens who are unlawfully in this country are "persons" guaranteed protection of equal laws under the fifth and fourteenth amendments,[19] and the fifth amendment protects illegal aliens from invidious discrimination by the federal government.[20]

The only situation in which the Court will deny an alien the right to claim protection of the fifth or fourteenth amendment is prior to the alien's entry into the United States. An unadmitted and nonresident alien has no constitutional right to enter the United States as a nonimmigrant or otherwise.[21] Even when the alien has been paroled into and is physically within the United States borders pursuant to the Immigration and Nationality Act,[22] until the admission is sought and granted the alien is not "within the United States." The Supreme Court has determined that prior to entering this country an alien, even one seeking legal admittance, is subject to whatever procedure is authorized by Congress. "[A]n alien on the threshold of initial entry stands on a different footing: 'Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.' "[23] Once an alien has entered this country, whether legally or illegally, that person is entitled to claim protection under the fifth and fourteenth amendments until such time as deportation occurs.[24]

16. Wong Wing v. United States, 163 U.S. 228, 238 (1896) *quoting* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (emphasis added).

17. Graham v. Richardson, 403 U.S. 365, 371 (1971); Truax v. Raich, 239 U.S. 33, 39 (1915).

18. Graham v. Richardson, 403 U.S. 365, 372 (1971); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 418-20 (1948); Truax v. Raich, 239 U.S. 33, 39 (1915).

19. Mathews v. Diaz, 426 U.S. 67, 77-78 (1976); Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969); Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953).

20. The Court has considered the fourteenth amendment as coextensive with the fifth amendment in protecting persons' rights to protection of equal laws. Claims are raised against state legislation for violating the equal protection clause of the fourteenth amendment, while a similar claim against the federal government is raised under the due process clause of the fifth amendment. Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969).

21. Kleindienst v. Mandel, 408 U.S. 753, 762 (1972).

22. 8 U.S.C. §§ 1101-1503 (1976). *See id.* § 1182(d)(5).

23. Leng May Ma v. Barber, 357 U.S. 185, 187-88 (1958) *quoting* Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953).

24. Graham v. Richardson, 403 U.S. 365, 371 (1971); Leng May Ma v. Barber, 357 U.S.

Apparently, the decision that plaintiffs are entitled to raise a claim under the equal protection clause, in addition to being the only issue not hotly contested between the majority and dissenting opinions, was the issue that did not deviate from the view in past cases and was, therefore, not that difficult an issue to determine.

Determining the Appropriate Standard of Judicial Review in Plyler

The more difficult question presented by these cases is a determination of the appropriate standard of review to be applied by the Court in deciding whether section 21.031 of the Texas Education Code[25] violated the equal protection clause of the fourteenth amendment. The determination of this question, i.e., the appropriate standard of judicial review applicable to these cases, is the primary point upon which the majority and the dissent strongly disagree.

Because the plaintiffs in this action are unlawfully in the United States, the Court reasons the plaintiffs have voluntarily entered the class that section 21.031 discriminates against. This undocumented status is not an absolutely immutable characteristic because it is the product of conscious and illegal action. For this reason the Court acknowledges there is no suspect class involved.[26]

The Court has determined the equal protection clause does not bestow upon federal courts the power to impose their views of what constitutes wise economic or social policy upon the states.[27] Consequently, when the statute attacked on the ground it violates the equal protection clause involves a classification based on social or economic welfare, with no suspect class or fundamental right involved, the United States Supreme Court has held the state to a more relaxed judicial standard of review.[28] In these cases, the statute is upheld if the state can show the statute arguably relates to a legitimate function of the government:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."[29]

185, 187 (1958); Shaughnessy v. Mezei, 345 U.S. 206, 212 (1953); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419-20 (1948); Truax v. Raich, 239 U.S. 33, 39 (1915); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886).

25. TEX. EDUC. CODE ANN. § 21.031 (Vernon 1972).

26. Plyler v. Doe, 102 S. Ct. 2382, 2396, n.19 (1982).

27. Vance v. Bradley, 440 U.S. 93, 97 (1979); Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194-95 (1978); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973); Dandridge v. Williams, 397 U.S. 471, 486 (1970).

28. Vance v. Bradley, 440 U.S. 93, 97 (1979); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976); Weinberger v. Salfi, 422 U.S. 749, 768-70 (1975); Dandridge v. Williams, 397 U.S. 471, 485-86 (1970).

29. Dandridge v. Williams, 397 U.S. 471, 485 (1970), *quoting* Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911). *See also* Vance v. Bradley, 440 U.S. 93, 97 (1979); Massachusetts

No case previously before the Court has held education to be a fundamental right either explicitly or implicitly protected by the United States Constitution. Education has been considered an issue of social welfare and has been specifically held not to be a fundamental right.[30]

Thus, because no fundamental right or suspect class is involved that would warrant the application of the upper tier of the long-recognized two-tier system of judicial review, i.e., strict scrutiny, the Court would be expected to apply the rational basis standard and require the state of Texas to show that the statute was rationally related to a legitimate state interest.[31] Under this less stringent standard of review the Texas statute would most likely have been upheld for "it simply is not 'irrational' for a State to conclude that it does not have the same responsibility to provide benefits for persons whose very presence in the State and this country is illegal as it does to provide for persons lawfully present."[32] The Court has previously held a state may protect its "fiscal interests and lawfully resident labor force from the deleterious effects on its economy resulting from the employment of illegal aliens."[33] This holding, considered with the Court's decision that a state has a legitimate interest in protecting and preserving the quality of its schools and "the right of its own bona fide residents to attend such institutions on a preferential tuition basis,"[34] appears to support the state's contention that section 21.031 is rationally related to a legitimate state interest.

The Standard of Review Applied by the Supreme Court in Plyler

In *Plyler*, however, the Court rejected the idea that the Texas statute need only be rationally related to a *legitimate* state interest and determined "the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some *substantial* goal of the State."[35]

Substituting "substantial" for "legitimate" creates what is attacked by the dissent as a standard applicable "only when illegal alien children are deprived of a public education."[36] This balancing test, or intermediate scrutiny, has been employed by the Court in recent years to evaluate the rationality of legislative judgment with reference to well-settled constitutional principles.[37]

By requiring the state to show that its statute furthers a substantial state

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Bd. of Retirement v. Murgia, 427 U.S. 307, 312-14 (1976); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 44 (1973).

30. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973); Lindsey v. Normet, 405 U.S. 56, 73-74 (1972).

31. Vance v. Bradley, 440 U.S. 93, 97 (1979); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 44 (1973); Dandridge v. Williams, 397 U.S. 471, 485 (1970).

32. Plyler v. Doe, 102 S. Ct. 2382, 2412 (1982) (Burger, C.J., dissenting).

33. De Canas v. Bica, 424 U.S. 351, 357 (1976).

34. Vlandis v. Kline, 412 U.S. 441, 453 (1973).

35. Plyler v. Doe, 102 S. Ct. 2382, 2398 (1982) (emphasis added).

36. *Id.* at 2409 (Burger, C.J., dissenting).

37. Trimble v. Gordon, 430 U.S. 762, 767 (1977); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 97-99 (1973) (Marshall, J., dissenting); Weber v. Aetna Cas. & Surety Co., 406 U.S. 164, 172 (1972); Dunn v. Blumstein, 405 U.S. 330, 335 (1972).

interest, the Court has acknowledged its gradual deviation from the rigid two-tier structure of judicial scrutiny. Although the Court does not specifically set out the test used to determine the appropriate standard for judicial review, the test in use has been set out by Justice Thurgood Marshall in cases previously before the Court.[38]

A superficial look at both the majority and dissenting opinions appears to support the contention that this is a decision based on the Court's abhorrence of denying any child a free public education. A closer look at certain prior decisions of the Court will show this decision is based on the Court's gradual "albeit *sub silentio*" rejection of the strict two-tier structure of judicial review.[39]

Looking at the classification involved in this action, the Court determined that the plaintiffs are special members of the underclass created by the substantial "shadow population" of illegal immigrants within the borders of the United States.[40] The plaintiff children in these cases "can affect neither their parents' conduct nor their own status."[41] Because these minor children have no control over their illegal status, "[e]ven if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice."[42]

For the state to deny a discrete group of innocent children the free public education it offers to other children within its borders, the statute must be justified by showing it furthers some substantial state interest.[43] The first and primary argument advanced by the state of Texas in support of its statute was that the undocumented status of the plaintiffs established a sufficient rational basis for denying them benefits afforded to other residents. The states, however, have no power with regard to classifying aliens. The power to classify on the basis of alien status and to look at the character of the relationship between the alien and the United States is left to the federal government, and such matters will rarely be relevant to state legislation.[44] While states do have some authority to act with respect to illegal aliens, such action must be consistent with federal objectives and further a legitimate state goal.[45] In *Plyler*, however, the state did not establish that the discrimination contained in its statute related to any identifiable congressional policy. Nor did the state claim that conservation of state educational resources was ever a congres-

38. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 318 (1976) (Marshall, J., dissenting); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting); Dunn v. Blumstein, 405 U.S. 330, 335 (1972).

39. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 320-21 (1976) (Marshall, J., dissenting).

40. Plyler v. Doe, 102 S. Ct. 2382, 2395-96 (1982).

41. *Id.* at 2396 *quoting* Trimble v. Gordon, 430 U.S. 762,770 (1977).

42. *Id.*

43. *Id.* at 2402.

44. Nyquist v. Mauclet, 432 U.S. 1, 7 n.8 (1977); Mathews v. Diaz, 426 U.S. 67, 81-85 (1976); Hines v. Davidowitz, 312 U.S. 52, 62-67 (1941).

45. De Canas v. Bica, 424 U.S. 351, 361 (1976).

sional concern in restricting immigration. More important, the Court determined that the classification in the statute was not consistent with the federal program and found no national policy to support the state's denying the children a public education.[46]

The state also contended the classification furthered an interest in preserving its limited resources for the education of its lawful residents. Prior cases have held that a concern for preservation of resources will not, standing alone, justify the classification used to allocate those resources.[47]

The state's next argument in support of its statute was the interest in protecting itself from an influx of illegal immigrants. The Court acknowledged a state might have an interest in mitigating the harsh economic effects of sudden shifts in population. The record before the Court, however, did not support the contention that illegal aliens imposed any significant burden on the state's economy. The evidence in the record suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc.[48] The Court determined that the dominant incentive for illegal entry into the state of Texas is the availability of employment. Few, if any, illegal immigrants come to the state of Texas in order to receive a free education.[49] Clearly, the better alternative to attempt to discourage illegal immigration would be to prohibit the employment of illegal aliens.[50]

The state conceded it may not reduce expenditures for education by barring an arbitrarily chosen class of children from its schools. The argument was made, however, that undocumented children are the appropriate class to exclude because they impose special burdens on the state's ability to provide high quality public education. The evidence in the record fails to support this contention. At the trials of both cases, the conclusion was reached that barring these children from local schools would not necessarily improve the quality of education provided in those schools.[51] The Court determined the state does not support its selection of this group as the appropriate target for exclusion because the educational cost and need of undocumented children are basically indistinguishable from legally resident aliens.[52]

The final argument advanced by the state in support of section 21.031 was that because of the plaintiffs' unlawful presence within the United States, they are less likely to remain within the boundaries of the state and put their education to productive social or political use. The Court determined that there is no assurance *any* child, citizen or not, will remain in the particular

46. Plyler v. Doe, 102 S. Ct. 2382, 2399 (1982).

47. Sugarman v. Dougall, 413 U.S. 634, 646 (1973); Graham v. Richardson, 403 U.S. 365, 374-75 (1971); Shapiro v. Thompson, 394 U.S. 618, 633 (1969).

48. Doe v. Plyler, 458 F. Supp. 569, 578 (E.D. Tex. 1978); *In re* Alien Children Educ. Litigation, 501 F. Supp. 544, 570-71 (S.D. Tex. 1980).

49. Plyler v. Doe, 102 S. Ct. 2382, 2401 (1982).

50. *Id.*; De Canas v. Bica, 424 U.S. 351, 361 (1976).

51. Doe v. Plyler, 458 F. Supp. 569, 577 (E.D. Tex. 1978); *In re* Alien Children Educ. Litigation, 501 F. Supp. 544, 583 (S.D. Tex. 1980).

52. Plyler v. Doe, 102 S. Ct. 2382, 2401 (1982).

state in which the child receives his education. The Court emphasized that many of the undocumented children disabled by this classification will remain in the United States indefinitely and some will become lawful residents or citizens of the United States. Whatever savings the state might achieve by denying these children an education, thus promoting the creation and perpetuation of a subclass of illiterates within this country, are insubstantial in comparison to the costs involved to these children, the state, and the nation.[53] For this reason the Court determined that the Texas statute, by attempting to control the parents' misconduct by acting against their children, does not comport with fundamental concepts of justice and is, therefore, unconstitutional.[54]

By requiring the state to show a substantial interest in support of the classification used in section 21.031, the majority opinion appears to make a sudden shift from the previously used two-tier method of judicial review. Justice Marshall, in his concurring opinion, applauds the wisdom of rejecting a rigidified approach to equal protection analysis. Justice Marshall emphasizes that the facts of these cases demonstrate the need for the Court to employ an approach that allows for varying levels of scrutiny depending upon "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."[55]

Justice Blackmun notes in his concurring opinion that when a state provides an education to some and denies it to others, there is immediately and inevitably a creation of the type of class distinctions fundamentally inconsistent with the purposes of the equal protection clause. A child denied an education is placed at a permanent and insurmountable competitive disadvantage and is denied even the opportunity to achieve. As Justice Blackmun points out, when an identifiable group of children is denied an education, that group will be converted to a discrete underclass and relegated to second-class social status. Classifications involving the complete denial of education "strike at the heart of equal protection values by involving the State in the creation of permanent class distinctions."[56]

The concurring opinion of Justice Powell analogizes the status of the undocumented children to the status of illegitimate children. The state of Texas excludes the plaintiffs from free public schools only because of a status resulting from the violation by parents or guardians of the United States immigration laws, and the fact that they remain in the country unlawfully. In this respect these children are innocent and penalizing them for the misdeeds of their parents is illogical and unjust. The basic concept of our system is that legal

53. *Id.* at 2401-02.

54. *Id.* at 2402.

55. *Id.* (Marshall, J., concurring); San Antonio Indep. School District v. Rodriguez, 411 U.S 1, 99 (1973) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519-21 (1970) (Marshall, J., dissenting).

56. Plyler v. Doe, 102 S. Ct. 2382, 2404 (1982) (Blackmun, J., concurring).

burdens should bear some relationship to individual responsibility or wrongdoing.[57]

Chief Justice Burger agrees with the Court's "expressly and correctly" rejecting any suggestion illegal aliens are a suspect class because their entry into the United States is itself a crime and not a constitutional irrelevancy.[58] The fact no suspect class is involved coupled with the view previously accepted by the Court that education is not a fundmental right[59] would, under the two-tier method of judicial scrutiny, only require the state to show the statute is rationally related to a legitimate state interest. The dissent urges "the distinction the State of Texas has drawn—based not only upon its legitimate interests, but on classifications established by the Federal Government in its immigration laws and policies—is not unconstitutional."[60]

At first glance, the position taken by Chief Justice Burger in his dissent appears fully justified. Although discrimination based on alienage has been regarded as a suspect classification,[61] no case in which the Supreme Court has attempted to define a suspect class has addressed the status of *illegal* aliens. The status of illegal aliens in this class, unlike most classifications recognized as suspect, is the product of voluntary, in fact criminal, entry into the United States.[62]

The dissent compares plaintiffs' lack of control over their illegal residence in this country to the problem of lawfully resident children who lack control over the school district in which their parents reside. Yet when the Court reviewed a claim that a state discriminated against residents of less wealthy school districts in its provision of educational benefits, the Court refused to require the state to show a substantial and compelling interest to support its legislation, and required the state only to show that the statute bore a rational relationship to a legitimate state purpose.[63]

Chief Justice Burger also criticizes the Court's apparent suggestion that education, while not a right implicitly or explicitly protected by the Constitution, is somehow more "fundamental" than food, shelter, or medical care.[64]

57. Justice Powell also discusses the fact that Congress has failed to provide effective leadership in dealing with the influx of illegal immigrants. The power to regulate immigration, as well as the power to deport illegal aliens, are exclusively within the federal government. The states' ability to respond to the problems caused by illegal immigration are limited by the principles of preemption applicable in this area. As long as the ease of entry remains inviting and the federal government exercises the power to deport infrequently, the duty will fall upon the Court to ensure that no person, even an illegal alien, is discriminated against by legislation that violates the equal protection clause. *Id.* at 2406. (Powell, J., concurring).

58. *Id.* at 2409. (Burger, C.J., dissenting).

59. San Antonio Indep. School District v. Rodriguez, 411 U.S. 1, 35 (1973); Lindsey v. Normet, 405 U.S. 56, 73-74 (1972).

60. Plyler v. Doe, 102 S. Ct. 2382, 2409 (1982) (Burger, C.J., dissenting).

61. Graham v. Richardson, 403 U.S. 365, 372 (1971); Brown v. Board of Educ., 347 U.S. 483, 490 (1954); Truax v. Raich, 239 U.S. 33, 41-43 (1915).

62. Plyler v. Doe, 102 S. Ct. 2382, 2396 (1982).

63. San Antonio Indep. School District v. Rodriguez, 411 U.S. 1, 40-44 (1973).

64. Plyler v. Doe, 102 S. Ct. 2382, 2411 (1982) (Burger, C.J., dissenting).

The dissent points out that the Court can show no meaningful way to distinguish between education and other governmental benefits in this context.[65] Previous cases before the Court involving either social or economic welfare have held the appropriate judicial scrutiny to be the less stringent rational relationship test.[66] The Court has specifically noted in past cases that the equal protection clause does not give the federal courts the power to impose upon states what the federal courts view as constitutionally wise social or economic policy.[67] In the area of social and economic welfare a state statute does not violate the equal protection clause merely because the classification made by the law is imperfect.[68] The statute will be held constitutional if it bears a rational relationship to a legitimate state interest.[69]

Chief Justice Burger acknowledged the state's contention that section 21.031 serves to prevent undue depletion of the limited revenues available for education and to preserve the fiscal integrity of the school financing system against an increasing influx of illegal aliens alone cannot justify an arbitrary and irrational denial of benefits to a particular group of persons. The Chief Justice urges, however, that prudent conservation of finite state revenues is not per se an illegitimate goal.[70] The conclusion reached by the dissenting Justices is that the state is not irrational by deciding it does not have the same responsibility to provide benefits for persons illegally present in this country as it does to provide for persons lawfully present. That the federal government has chosen to exclude illegal aliens from numerous social welfare programs, in Chief Justice Burger's view, tends to support the rationality of excluding illegal alien residents of a state from such programs so as to preserve finite revenues for the benefit of lawful residents. Chief Justice Burger reaches the result that in the absence of a constitutional imperative to provide an education for illegal aliens, the state may rationally choose to take advantage of whatever savings will accrue from limiting access to the tuition-free public schools to its own lawful residents. For these reasons, section 21.031 is ra-

65. *Id.*

66. Mathews v. Diaz, 426 U.S. 67 (1976) (the Court upheld the constitutionality of the provisions of the Social Security Act denying eligibility for the Medicare Supplemental Medical Insurance Program to aliens 65 or older, unless they had been admitted for permanent residence and had also resided in this country for five years); Weinberger v. Salfi, 422 U.S. 749 (1975) (the Court upheld the constitutionality of a Social Security Administration requirement that a widow have been married to her husband nine months prior to his death in order to collect Social Security benefits); Dandridge v. Williams, 397 U.S. 471 (1970) (the Court upheld the constitutionality of a ceiling limit imposed by the state of Maryland on benefits available to any one family under the Federal Aid to Families with Dependent Children Program).

67. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194-95 (1978); Dandridge v. Williams, 397 U.S. 471, 485 (1970).

68. Mathews v. Diaz, 426 U.S. 67, 78-84 (1976); Dandridge v. Williams, 397 U.S. 471, 486 (1970).

69. Vance v. Bradley, 440 U.S. 93, 97 (1979); Weinberger v. Salfi, 422 U.S. 749, 768-70 (1975); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 32 (1973); Dandridge v. Williams, 397 U.S. 471, 485 (1970).

70. Plyler v. Doe, 102 S. Ct. 2382, 2411-12 (1982) (Burger, C.J., dissenting).

tionally related to a legitimate state interest and is, therefore, constitutional, according to the dissenting opinion.[71]

The dissent also criticizes what it views as the Court's attempt to set the nation's social policy, calling the theory used by the majority "quasi-suspect-class and quasi-fundamental-rights analysis . . . custom-tailored to the facts of these cases."[72] The majority opinion is termed a prime example of an unabashedly result-oriented approach.[73] This criticism voices the concern that the use of intermediate scrutiny or a balancing test to determine equal protection claims will result in the Court becoming an "omnipotent and omniscient problem solver."[74] The Court's taking action to remedy what is perceived as failure of the political process to exercise the powers allocated to it could weaken the political process and encourage political branches to pass their problems on to the judiciary.[75]

Admittedly, the Constitution does not provide a cure for every social ill, nor vest judges with a mandate to try to remedy all of society's problems.[76] The Court's holdings reflect the view that when no suspect class is involved and the legislation challenged pertains to social welfare, the state need only show that the legislation is rationally related to a legitimate state interest.[77]

Unfortunately, not all cases involving social welfare can be made to fit into the rational basis test and still comport with what is considered to be fundamental fairness under the equal protection clause. This is why the rigidified two-tier approach to equal protection analysis is inappropriate; the Court's decisions in this field defy such easy categorization.[78]

While the Court has outwardly adhered to the two-tier approach for judicial review, i.e., strict scrutiny or rational basis, it appears to have evolved a test to determine the constitutionality of a statute attacked on equal protection grounds depending on the interest affected or the classification involved.[79] The Court has used this intermediate test when met with cases touching upon the prized rights and burdened classes of our society.[80] While only Justice Thurgood Marshall has explicitly adopted the test for intermediate scrutiny,[81]

71. *Id.* at 2413.

72. *Id.* at 2409 (Burger, C.J., dissenting).

73. *Id.*

74. *Id.* at 2408 (Burger, C.J., dissenting).

75. *Id.* at 2414.

76. Lindsey v. Normet, 405 U.S. 56, 74 (1972); Reynolds v. Sims, 377 U.S. 533, 624-25 (1964) (Harlan, J., dissenting).

77. Ambach v. Norwick, 441 U.S. 68, 73-74 (1979); Foley v. Connelie, 435 U.S. 291, 294-97 (1978); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312-14 (1976); Weinberger v. Salfi, 422 U.S. 749, 768-70 (1975); Dandridge v. Williams, 397 U.S. 471, 486-87 (1970).

78. Craig v. Boren, 429 U.S. 190, 210-11 (1976) (Powell, J., concurring); San Antonio Indep. School District v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting).

79. Dunn v. Blumstein, 405 U.S. 330, 335 (1972).

80. Trimble v. Gordon, 430 U.S. 762, 769 (1977); Craig v. Boren, 429 U.S. 190, 210 (1976) (Powell, J., concurring); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 320 (1976) (Marshall, J., dissenting); Weber v. Aetna Cas. & Surety Co., 406 U.S. 164, 172 (1972).

81. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (Marshall, J., dissent-

in certain cases the Court has silently looked to three areas to determine whether the statute involved is constitutional under the equal protection clause. Emphasis is placed upon the character of the classification in question, the relative importance to the individuals in the class discriminated against of the governmental benefits they will not receive, and the asserted state interest in support of the classification.[82] As the nexus between the specific constitutional guarantee and the nonconstitutional interest draw closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when that interest is infringed upon in a discriminatory manner should be adjusted accordingly.[83] Although Justice Brennan does not acknowledge using this test in the majority opinion, it appears to be applied in *Plyler* in determining the appropriate standard of judicial review to be used in evaluating Texas' educational code section 21.031.

The Court's Application of Intermediate Scrutiny

The Court first looked at the character of the classification involved in section 21.031. Technically, the plaintiff children in these cases are illegal aliens, and as such the state could arguably support the view that it is permissible to withhold benefits from the plaintiffs because their presence in the United States is due to their own unlawful conduct. Realistically, however, these children have little or no control over their parents' decision to illegally immigrate to the United States and, therefore, lack control over their own unlawful presence in the United States. To penalize these children for being unlawfully within the United States border appears to be the effect of section 21.031. "Sec. 21.031 is directed against children and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control."[84] Section 21.031 does not discriminate against a suspect class,[85] but the classification is still invidious because it discriminates against a particularly disadvantaged and powerless class, the children of illegal aliens.

The Court next looked to the importance of education to the plaintiffs in *Plyler*. To deprive these children of a free public education seems grossly unfair. Although education is not a "right granted to individuals by the Constitution,"[86] the relative importance of an education to the children in-

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ing); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting); Dunn v. Blumstein, 405 U.S. 330, 335 (1972).

82. Trimble v. Gordon, 430 U.S. 762, 769-76 (1977); Craig v. Boren, 429 U.S. 190, 199-204 (1976); Weber v. Aetna Cas. & Surety Co., 406 U.S. 164, 168-74 (1972); Dunn v. Blumstein, 405 U.S. 330, 335 (1972); Reed v. Reed, 404 U.S. 71, 76-77 (1971).

83. San Antonio Indep. School District v. Rodriguez, 411 U.S. 1, 102-03 (1973) (Marshall, J., dissenting).

84. Plyler v. Doe, 102 S. Ct. 2382, 2397 (1982).

85. Graham v. Richardson, 403 U.S. 365, 372 (1972); Brown v. Board of Educ., 347 U.S. 483, 490 (1954); Truax v. Raich, 239 U.S. 33, 41-43 (1915).

86. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973); Lindsey v. Normet, 405 U.S. 56, 73-74 (1972).

volved here is obvious. Education is not "merely some governmental benefit indistinguishable from other forms of social welfare legislation."[87]

In prior cases the Court has accepted and even emphasized the important role education plays in our society[88]:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibility, . . . the very foundation of good citizenship. . . a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. . . . [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[89]

The Court notes that education is significant not only to these children, but to society as a whole.[90] "[E]ducation prepares individuals to be self-reliant and self-sufficient participants in society."[91] To deny these children an education will not only handicap the individual, but will also result in significant social costs that will have to be borne by society. In addition, the "denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit."[92] Because section 21.031 discriminates against a class of children who lack control over their illegal status, and because education is a benefit important to both the individual and society, the Court determined the state must establish that section 21.031 furthers a substantial state goal before the statute will be held constitutional.[93]

Finally, the Court looked to the state's asserted interest in support of the classification. The state's primary argument in support of the classification

87. Plyler v. Doe, 102 S. Ct. 2382, 2397 (1982).

88. Ambach v. Norwick, 441 U.S. 68, 76 (1979) (Court recognizes education as the primary vehicle for transmitting the values on which our society rests); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972) ("some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence"); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (the Court recognizes that education and the acquisition of knowledge have always been regarded as matters of supreme importance).

89. Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

90. Plyler v. Doe, 102 S. Ct. 2382, 2397 (1982).

91. Ambach v. Norwick, 441 U.S. 68, 76-77 (1979); Wisconsin v. Yoder, 406 U.S. 205, 221 (1972); Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

92. Plyler v. Doe, 102 S. Ct. 2382, 2397 (1982).

93. *Id.* at 2398.

contained in section 21.031 is that the plaintiffs' undocumented status establishes a sufficient rational basis for denying them the benefit of an education the state might choose to afford other, lawful residents. Although the states do have some authority to act with respect to illegal aliens, the action should mirror federal objectives and further a legitimate state goal.[94]

In these cases, however, the Court determined "there is no indication that the disability imposed by Sec. 21.031 corresponds to any identifiable congressional policy."[95] The state of Texas did not contend the conservation of state educational funds was a congressional concern in restricting immigration, and there is no apparent national policy to support a state in denying any child an elementary education. Mere concern for the preservation of resources standing alone will not justify the classification used in allocating those resources.[96]

Admittedly the state may have an interest in protecting itself from an influx of illegal immigrants. State statutes regulating employment of illegal aliens have been held constitutional as being within the state's police power where the statute in question is consistent with pertinent federal laws.[97] The statute involved in these cases, however, is "a ludicrously ineffectual attempt to stem the tide of illegal immigration."[98] The better alternative would be to prohibit or regulate the employment of illegal aliens rather than attempt to discourage illegal immigration into the United States by charging tuition or denying enrollment in public schools to undocumented children.

Because the educational needs and costs of undocumented children are basically the same as those of documented resident alien children, there is little merit to any argument that this group of undocumented children is the appropriate target for exclusion. "[A] state can't use a saving of welfare costs to justify an otherwise invidious classification."[99] Neither can the state justify its classification on the grounds that these undocumented children will not remain within the state to put their education to use. No state can guarantee that any child will stay there to utilize his education. To discriminate against these undocumented children on this ground is just as likely to hurt the state and the nation "by promoting the creation and perpetuation of a sub-class of illiterates"[100] that could remain indefinitely in the United States, if not the specific state.

Conclusion

Deciding cases in the equal protection area is a difficult task. Under the two-tier structure of review, unless a suspect class or a fundamental right is

94. De Canas v. Bica, 424 U.S. 351, 356-63 (1976).

95. Plyler v. Doe, 102 S. Ct. 2382, 2399 (1982).

96. Sugarman v. Dougall, 413 U.S. 634, 646 (1973); Graham v. Richardson, 403 U.S. 365, 374-75 (1971); Shapiro v. Thompson, 394 U.S. 618, 633 (1969).

97. De Canas v. Bica, 424 U.S. 351, 356-63 (1976).

98. Plyler v. Doe, 102 S. Ct. 2382, 2401 (1982).

99. Graham v. Richardson, 403 U.S. 365, 374-75 (1971); Shapiro v Thompson, 394 U.S. 618, 633 (1969).

100. Plyler v. Doe, 102 S. Ct. 2382, 2402 (1982).